Supreme Court, U.S.
FILED
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No. _____

In The

Supreme Court of the United States

1996 Term

CHERIEL JENSEN,

Appellant & Petitioner,

vs.

COUNTY OF SANTA CLARA, SANTA CLARA COUNTY BOARD OF SUPERVISORS, DIANE MCKENNA, ZOE LOFGREN, RON GONZALES, ROD DIRIDON, MICHAEL HONDA, SALLY REID, PAUL SAGERS, PETER CLAUS, GEORGE TOKUSHIGE, DOWARD WASHINGTON, LEODE FRANKLIN, GREG WASENHOVE, IMELDA ELONZO, THOMAS FINN, ET. AL. THROUGH 100

Appellees & Respondents

No. 94-16824

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX
TO PETITION FOR WRIT OF CERTIORARI

Cheriel Jensen, pro se
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1 408 379 0463

21 pp

DECLARATION OF CHERIEL JENSEN

I, CHERIEL JENSEN, declare the contents attached are true and correctly transcribed text of Orders and determinations which are the subject of my Petition for Writ of Certiorari:

Appendix 1. Order denying Petition for rehearing by the United States Court of Appeals for the Ninth Circuit, filed and entered December 1, 1995.

Appendix 2. Memorandum of the United States Court of Appeals for the Ninth Circuit filed and entered October 26, 1995, the judgment of the U. S. District Court for the Northern District of California affirmed in part and reversed in part.

Appendix 3. Judgment of the United States Court of Appeals for the Ninth Circuit filed and entered December 12, 1995.

Appendix 4. Order of the U. S. District Court for the Northern District of California filed January 18, 1994 dismissing individual government defendants and dismissing certain causes of action.

Appendix 5. Order of the U. S. District Court for the Northern District of California filed June 27, 1994 dismissing remaining causes as to County defendants and Finn, but not all defendants.

Appendix 6. Final order of the U. S. District Court for the Northern District of California dismissing all parties and causes, entered September 19, 1994

I declare under penalty of perjury that the following are true and correct text of the above listed orders and determinations which are the subject of this Petition.

EXECUTED on February 22, 1996

By: _____
CHERIEL JENSEN

Respectfully submitted February 29, 1996

By: _____
CHERIEL JENSEN

Appendix 1

FILED DECEMBER 1, 1995

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHERIEL JENSEN Plaintiff - Appellant v. COUNTY OF SANTA CLARA; INSTAR PEST CONSULTANTS, INC.; APPLIED PEST MANAGEMENT.; GREGORY CLARK; et al., Defendants-Appellees.	)	No. 94-16063 No. 94-16824 D.C. No. CV-93-20617-JW **ORDER**

Before: FLETCHER, POOLE and O'SCANNLAIN, Circuit Judges.

The petition for rehearing is DENIED.

Appendix 2

FILED OCTOBER 26, 1995

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHERIEL JENSEN Plaintiff -Appellant v. COUNTY OF SANTA CLARA; INSTAR PEST CONSULTANTS, INC.; APPLIED PEST MANAGEMENT INC.; GREGORY CLARK; et al., Defendants-Appellees.	)	Nos. 94-16824, 94-16824 D.C. No. CV-93-20617-JW **MEMORANDUM***

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted August 16, 1995
San Francisco, California

Before: Fletcher, Poole, and O'Scannlain, Circuit Judges.

Cheriel Jensen worked as an Associate Planner for the County of Santa Clara from May 1977 through July 10, 1993.[1/] The county hired Instar Pest Consultants, Inc., ("Instar") from 1983 to 1990 and Applied Pest Management, Inc., from 1990 to 1993 to provide pest control services for the building in which Jensen worked. On June 14, 1993, Jensen filed suit in Santa Clara County Superior Court against Instar, Applied Pest Management, Inc. and its representative, Gregory Clark (collectively, "APM"), the County, the County Board

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by the Ninth Circuit Rule 36-3.

1/ Jensen was on sick leave and extended medical leave from July 1, 1992 through July 10 1993. She is now retired and receives disability benefits.

of Supervisors, five named individual supervisors, eight public employees, and the County's Workers' Compensation attorney, Finn (collectively, "county defendants"). Jensen sought damages for injuries allegedly due to pesticide exposure in the workplace.[2] Over Jensen's objections, defendant's removed the action to federal court. The county defendants, Instar, and APM each moved separately to dismiss Jensen's complaint.[3]

In an order dated January 18, 1994, the district court dismissed with prejudice thirteen of the county defendants and seventeen of Jensen's causes of action. The district court dismissed with leave to amend five of Jensen's claims against the remaining county defendant's. Jensen filed a First Amended Complaint on February 24, 1994. On April 28, 1994, the district court granted summary judgment and costs in favor of Instar, finding that Jensen's personal injury claims against Instar were time-barred by California's one-year statute of limitations. On June 7, 1994, Jensen filed a Second Amended Complaint against APM and a motion to remand to superior court. On June 16, 1994, the district court denied Jensen's motion for remand. On June 27, 1994, the district court entered an order dismissing Jensen's remaining claims from her first Amended Complaint against the county defendants. On September 19, 1994, the district court dismissed Jensen's Second Amended Complaint against APM and Clark pursuant to Fed. R. Civ. P. 41(b) for failure to comply with a court order.

Jensen now appeals the district court's dismissal of her claims against county defendant's, its grant of summary judgment in favor of Instar, its denial of her motion to remand, and its dismissal of her Second Amended Complaint against APM and Clark. She also argues that the district judge was unfairly biased against her. She seeks reinstatement of her claims and remand to state court. Jensen appeals have been consolidated. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part and reverse in part.

2/ Jensen sued 19 named and 100 unnamed defendants. Jensen asserted twenty-two causes of action including negligence, personal injury, failure to warn, violation of the right to freedom under the California Constitution, denial of civil rights in violation of 42 U.S.C. § 1983, retaliatory discharge, violation of the American's with Disabilities Act, fraudulent concealment, breach of contract, and violation of various state statutes.

3/ The county defendants also moved unsuccessfully for Rule 11 sanctions against Jensen.

I. JENSEN'S CLAIMS AGAINST THE COUNTY DEFENDANTS

Jensen appeals the district court's dismissals of each of her causes of action and of every county defendant.

A. Personal Injury

The district court dismissed with prejudice Jensen's claims of personal injury incurred in the scope of employment on the grounds that they were preempted by the California Worker's Compensation Act, Cal. Lab. Code §§ 3200-6240.

We review dismissals for lack of subject matter jurisdiction de novo. Carpenter v. DOT, 13 F.3d 313, 314 (9th Cir. 1994). The Worker's Compensation Act provides an exclusive remedy for an employee injured in the course of employment. Cal Lab. Code § 3600 (a). The Act exempts cases where the employer fraudulently conceals the existence of both the injury and its cause. Id. Jensen has not alleged that the County fraudulently concealed the existence of an injury. Thus, the exception does not apply to her case, and the district court's ruling must stand.

B. Claims Against Named Individuals

The district court dismissed on immunity grounds Jensen's claims against the five named members of the Board of Supervisors, the eight named public employees, and the County's Workers' Compensation attorney, Finn. We review the district court's decision regarding immunity of the county defendants de novo. See Harrison v. Hickel, 6 F.3d 1347, 1352 (9th Cir. 1993).

The five named members of the County Board of Supervisors are not vicariously liable for injuries caused by acts or omissions of the Board. Cal.Gov't Cod § 820.9. The eight named public employees are immune from liability for actions taken within the scope of their employment. Id. [4/] The communications between Finn and Jensen related to the adjudication of her Workers' Compensation claims are privileged and immune from tort liability. Cal. Civ. Code § 47(b); Rubin v. Green, 4 Cal.4th 1187, 1193-94 (1993). Therefore, Finn is also exempt from liability. We affirm the

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4/ Moreover, Jensen is time-barred from asserting personal injury claims against the county defendants as she filed suit outside of the six month statute of limitations. Cal. Gov't Code § 911.2

district court rulings with respect to the immunity of the government defendants.

C. Jensen's 1983 Claim.

The district court dismissed Jensen's claim against the county defendants pursuant to 42 U.S.C. § 1983 for failure to state a claim. We review that dismissal de novo. Everest & Jennings v. American Motorists Inc. Co., 23 F.3d 226, 228 (9th Cir. 1994). The district court correctly determined that Jensen has not cited to any constitutional or statutory provision which has been violated. Her claimed freedoms to eat, work, read, embrace one's children, and be free from puzzling illness, while desirable, are not protected by any federal statutory or constitutional provision.

D. The Americans with Disabilities Act

The district court found that Jensen could not file a claim under the American's with Disabilities Act, 42 U.S.C. §§ 12101-12213, ("ADA") because the ADA, which is not retroactive, took effect on July 26, 1992, and Jensen stopped work on July 1, 1992. We review the district court's application of the statutory provisions de novo. See Boone v. United States, 944 F.2d 1489, 1492 (9th Cir. 1991). The ADA is not retroactive. Burfield v. Brown, Moore, Flint, Inc., 51 F.3d 583, 588 (5th Cir. 1995); Raya v. Mayatt Industries, 829 F.2d 1169, 1174 (N.D. Cal. 1993). Jensen stopped working prior to the ADA's effective date. Thus, we affirm the district court's finding.

E. Standing

The district court found that Jensen lacked standing to sue for "misuse of authority" on behalf of the neighborhood children, her grandson, three opossums and five neighborhood cats who died, allegedly due to rat poisoning placed by agents of the County. It also found she lacked standing to sue for the County's alleged breach of her union collective bargaining agreement. We review those determinations de novo. Wedges/Ledges of California, Inc. v. City of Phoenix, 24 F.3d 56, 61 (9th Cir. 1994).

The district court was correct that Jensen lacks standing to sue on behalf of neighborhood animals that are not her property. It was also correct that she lacked standing to sue for the neighborhood children or her grandson since she was not their guardian ad litem. The district court was also correct that Jensen does not have standing

as a union member to sue the County for alleged breach of a collective bargaining agreement. See Cal. Gov't Code § 3503.

II. JENSEN'S CLAIMS AGAINST INSTAR

Instar ceased all pesticide consulting and application for the County in 1990. Jensen filed her complaint on June 14, 1993. Jensen argued that her claims were timely because she did not learn of the cause of her injury until June 12, 1992. The district court disagreed and dismissed Jensen's eighteen personal injury claims against Instar as time-barred by California's one-year statute of limitations for personal injury action, Cal. Civ. Proc. Code § 340(3).

Jensen raises numerous arguments on appeal to challenge the district court's dismissal of her claims against Instar. She argues, among other things, that her personal injury claims against Instar are not time-barred because she did not discover the cause of her injury until June 12, 1992, and that the district court did not address her claims against Instar for violation of the California Labor, Business & Professional, Food & Agriculture and Health & Safety Codes, and 7 U.S.C. § 136(i)-(j), all of which have statutes of limitations longer than one year.

We review the district court's grant of summary judgment de novo. Jesinger v. Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994). The district court's dismissal on statute of limitation grounds is a mixed question of law and fact which we review for clear error. Rose v. United States, 905 F.2d 1257, 1259 (9th Cir. 1990); Schultz v. Department of Army, 886 F.2d 1157, 1159 (9th Cir. 1989).

A. Date of Discovery

Jensen suffered increasingly severe symptoms from 1977 to 1992. During that period, Jensen claims that she suspected the pesticide Malathion, which was sprayed by the state of California in 1979 to prevent the spread of the medfly, as the cause of her injuries. In 1981, she brought a legal action against the State of California and a helicopter company as a result of the Malathion medfly spraying.[5/]

5/ The case was dismissed for lack of prosecution.

On September 24, 1991, Jensen saw Dr. Ronald S. Greenwald, A neurologist. Dr. Greenwald wrote a letter dated September 30, 1991 to Jensen's referring physician which stated:

> This is a 52-year old, right handed white female with a long history dating back ten years ago of being poisoned with Malathion and lindane together. This was exposed to her skin for over 24 hours when they were spraying for the medfly outbreak ten years ago. She states that this was the beginning of her injury and accident . . . . She states that she has had many reactions to malathion. . . .

Jensen claims that she did not suspect that her injuries were caused by Instar's spraying of the Safrotin in her workplace until June 12, 1992. On that date, Jensen observed APM agents spraying Safrotin at her office during working hours, and suffered acute physical symptoms. Upon discovering the cause of her symptoms, Jensen lead an effort to evacuate the building.

The discovery rule tolls California's one year statute of limitations for personal injury actions until such time as the plaintiff is or should reasonably be aware of her injury and its negligent cause. Jolly v. Eli Lilly & Co., 44 Cal.3d 1103, 1109 (1988). The limitations period begins when the plaintiff suspects, or should suspect, that she has been wronged. Id. at 1114. A plaintiff is held to actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to her. Id. at 1109.

Prior to June 12, 1992, Jensen had no reason to suspect that Safrotin, a possible cause of her injuries, was being applied in her workplace. Until that date, when she acquired actual knowledge of spraying, Jensen reasonably believed that her earlier Malathion exposure was the sole cause of her injuries. Dr. Greenwald's letter supported her hypothesis. We therefore find that the limitations period began to run on June 12, 1992, when Jensen first had reason to believe that pesticides sprayed in her workplace could be causing her injuries. Jensen's June 14, 1993 filing fell within the California one-year statute of limitations for personal injury actions and is therefore timely. Accordingly, we reverse the district court's holding on this issue.[6/]

6/ We therefore need not reach Jensen's other arguments regarding the district court's dismissal of her personal injury claims against Instar.

B. Statutory Causes of Action

Jensen does not have standing to sue the statutory provisions she cites in her complaints. The California statute requiring a pest control company to notice the owner and tenant of the premises on which work is to be done does not apply to Jensen as an employee of the owner and tenant of the premises. See Cal. Bus & Prof. Code § 8538. The duties of an employer stipulated by California's Occupational Safety & Health law do not apply to employers who are governmental entities. Cal. Lab. Code § 6434. Federal and state pest Control regulations do not give Jensen a right to sue. See 7 U.S.C. §§ 136 -136y (Administrator of the Environmental Protection Agency has authority to enforce federal pesticide control regulations); Cal. Food & Agric. Code § 11501.5 (director and commissioner of each county have authority to enforce regulations of pest control operation); California Health and Safety Code §25249.7(d) (individual may sue in public interest only after she has given notice to Attorney General and district attorney and they do not prosecute said violation.)

III. REMAND

Jensen's original complaint and her First Amended Complaint each contained federal causes of action for violations of 42 U.S.C. § 1983 and the ADA. Jensen's Second Amended Complaint contained only state causes of action. Despite the fact that the federal claims had dropped out of the suit, the district court retained jurisdiction and dismissed Jensen's Second Amended Complaint. Jensen appeals the district court's failure to remand this case back to superior court. 7/

We review de novo the district court's denial of Jensen's motion to remand. Eyak Native Village v. Exxon Corp., 25 F.3d 773, 777 (9th Cir.) cert. denied, 115 S.Ct. 351 (1994). We hold that the district court did not err by retaining jurisdiction over Jensen's remaining state law claims. A ederal court may retain jurisdiction of pendent state law claims, even when the federal claims are dropped from the suit, when the district court determines that retaining jurisdiction "best serves the principles of economy, convenience, fairness and comity." Carnegie-Mellon University v. Cohill, 484 U.S. 343, 357 (1988). Jensen's federal cause of action dropped out at an advanced stage of this proceeding. See id. at 350 (when federal causes of action drop out early from an action, court may wish to

7/ Jensen earlier asked the district court not to remand this case because she found the federal building an "easier facility" than the state courthouse in light of her claimed physical condition.

exercise discretion to remand remaining state law claims). Moreover, the federal questions stemmed from the same nucleus of operative fact as did Jensen's numerous state law claims. The district court correctly determined that it best served the principles of judicial economy to retain jurisdiction over Jensen's pendent state law claims. See id. at 357.

IV. JENSEN'S CLAIMS AGAINST APM

The district court directed Jensen to file a Second Amended Complaint setting "forth the allegations contained in her Second and Third Claims only against Defendant's Applied Pest Management, Inc. and Gregory Clark.[8/] All other claims and defendant's have been dismissed, and Plaintiff's second Amended Complaint should so indicate." On May 4, 1994, Jensen filed a Second Amended Complaint without leave of the court. She moved for reconsideration on May 12, 1994. The district court entered an order striking Jensen's Second Amended Complaint on May 16, 1994. Jensen refiled her Second Amended Complaint with leave of the court on June 7, 1994. On June 27, 1994, the district court denied her motion for reconsideration.

Jensen revised the caption of her complaint and deleted the paragraphs setting forth the causes of action that had been dismissed. However, Jensen realleged these dismissed causes of action in Paragraph XIII of her Second Amended Complaint as evidence of negligence. Paragraph XIII charges APM with reckless disregard for life, health, and safety; lack of notice; deliberate concealment; aggravation of injury; violations of the California Labor, Business & Professional, Food & Agriculture and Health & Safety Codes. In that paragraph, Jensen notes that "violation of statutes is cited here as evidence of negligence and not as legal action under the cited statutes."

The district court found that the Second Amended Complaint "contains all of her claims against all of the defendants which have been dismissed in this action." The court dismissed the complaint with prejudice pursuant to Fed. R. Civ. P. 41(b) for Jensen's failure to comply with a court order.

District courts have the power to dismiss claims with prejudice for failure to comply with an order of the court. Von Bronkhorst v.

8/ These claims raised allegations of negligence per se, ultra hazardous activity, willful creation of dangerous condition of property, negligence and failure to warn as tort.

Safeco Corp., 529 F.2d 943, 947 (9th Cir. 1976). Dismissal is a severe remedy. District courts may impose this sanction only after weighing five factors: (1) the public interest in expeditious resolution of litigation; (2) the court's need to manage its docket; (3) the risk of prejudice to the litigants; (4) the public policy favoring the disposition of cases on their merits; and (5) the availability or less drastic sanctions. Ferdik v Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir.), cert denied, 113 S. Ct. 321 (1992); Thompson v. Housing Authority of Los Angeles, 782 F.2d 829, 831 (9th Cir), cert. denied, 479 U.S. 829 (1986).

We review for abuse of discretion the district court's dismissal of the action for failure to comply with a court order. Thompson, 782 F. 2d at 832; Von Bronkhorst, 529 F.2d at 947-48. Because the district judge is in the best position to assess the circumstances, we give Judge Ware's determination that Jensen failed to comply with the order considerable weight on appeal, Von Bronkhorst, 529 F.2d at 947-48. However, we note that dismissal is a harsh sanction reserved for extreme circumstances, Thompson, 782 F.2d at 83.

We apply the five-factor test and conclude that Jensen's partial noncompliance does not merit dismissal of her Second Amended Complaint. The district court had an interest in the expeditious resolution of this litigation and need to control its docket. Jensen, however, did not deliberately stall the proceedings and in fact attempted to conform her Second Amended Complaint to the court's order. Although she did not comply fully, Jensen, a prose plaintiff, 9/ did modify her complaint in a manner consistent with the order. Dismissal severely prejudiced Jensen and eliminated any chance she had to adjudicate her case on the merits. Moreover, the court had at its disposal the less drastic sanctions of striking Paragraph XIII from the Second Amended Complaint or ordering Jensen to file an additional amended complaint deleting the remaining non-conforming claims and defendants. We therefore hold that the district court abused its discretion by dismissing Jensen's Second Amended Complaint. We reverse the district court's dismissal of Jensen's Second Amended Complaint.

9/ APM argues that Jensen' admission that she is not the "run of the mill plaintiff" because her brother is an attorney and because she has previous legislative experience weakens her claims for special treatment as a pro se plaintiff. We disagree. Jensen is not an attorney, and despite her relation to an attorney, we should not treat her as such.

V. BIAS OF THE DISTRICT COURT JUDGE

Jensen alleges for the first time on appeal that Judge Ware was biased against her because he was also assigned on a random basis to preside over Jensen's defamation suit against one of her doctors. Judge Ware remanded that suit to state court. Because Jensen failed to file an affidavit of judicial bias with Judge Ware during the pendancy of the district court proceeding, we cannot address her claim of judicial bias. See 28 U.S.C. § 144. Moreover, we find no merit in Jensen's arguments for recusal. See United States v. Studley, 783 F.2d 934, 939 (9th Cir. 1986) (alleged prejudice must result from an extrajudicial source; a judges prior adverse ruling is not sufficient cause for recusal).

VI. CONCLUSION

The district court's dismissal of Jensen's personal injury claims against Instar and its dismissal of Jensen's Second Amended Complaint are **REVERSED** and **REMANDED** for proceedings consistent with this memorandum disposition. All other rulings of the district court are **AFFIRMED.**

Appendix 3

stamped: **FILED DECEMBER 12, 1995**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-16063
Ct/AG#: CV-93-20617-JW

CHERIEL JENSEN
Plaintiff - Appellant

v.

COUNTY OF SANTA CLARA, INSTAR PEST CONSULTANTS, INC., et al
Defendants - Appellees

NO. 94-16824
Ct//AG#: CV-93-20617-JW

CHERIEL JENSEN
Plaintiff - Appellant

v.

COUNTY OF SANTA CLARA, APPLIED PEST MANAGEMENT., GREGORY CLARK, et al.,

Defendants - Appellees

APPEAL FROM the United States District Court for the Northern District of California (San Jose).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Jose) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED in part and REVERSED and REMANDED in part.

Filed and Entered October 26, 1995

Appendix 4

stamped **FILED January 18, 1994**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHERIEL JENSEN, Plaintiff, vs. (1) COUNTY OF SANTA CLARA, (2) THE SANTA CLARA BOARD OF SUPERVISORS, (3) DIANE MCKENNA, (4) ZOE LOFGREN, (5) RON GONZALES, (6) ROD DIRIDON, (7) MICHAEL HONDA (8) SALLY REID, (9) PAUL SAGERS, (10) PETER CLAUS (11) GEORGE TOKUSHIGE (12) DOWARD WASHINGTON (13) APPLIED PEST MANAGEMENT, INC., (14) GREGORY CLARK, (15) INSTAR PEST CONSULTANT'S, INC., (16) LEODE FRANKLIN, (17) GREG WASENHOVE, (18) IMELDA ELONZO, (19) THOMAS FINN, DOES 1 THROUGH 100 Defendants.	)	CASE NO. C 93-20617 JW ORDER GRANTING DEFENDANTS' MOTION TO DISMISS WITH LEAVE TO AMEND

Defendants County of Santa Clara, The Santa Clara County Board of Supervisors, Diane McKenna, Zoe Lofgren, Ron Gonzales, Rod Diridon, Michael Honda, Sally Reid, Paul Sagers, Peter Claus, George Tokushige, Doward Washington, Leode Franklin, Greg Wasenhove, Imelda Elonzo, and Thomas Finn, move (1) to dismiss the complaint against them; (2) to strike portions of the complaint; and (3) for a more definitive statement. Defendants Applied Pest Management, Inc. and Gregory Clark also filed a motion to dismiss, to strike and for a more definite statement.

The Court notes that defendant Instar Pest Consultant, Inc. has appeared in pro se by a responsive pleading and a cross complaint filed by its president, but that it has not, made any motion which is currently before the Court.

INTRODUCTION

Plaintiff is seeking to recover damages for alleged exposure to pesticides at her place of employment. In a complaint containing twenty-two causes of action Plaintiff sues all above-named Defendants on several different causes of action. She claims to have incurred a multitude of symptoms stemming from the use of pesticides at her place of employment. The symptoms include crippling leg cramps, disturbed moisture balance, disturbed bowels, and visual disturbance. She also claims she is suffering from ongoing medical conditions, including deteriorating spine, loss of sensation in legs and hands, loss of hair, skin rash, dizziness, headache, and flu-like symptoms.

Plaintiff worked for fourteen years as a Planner III for Santa Clara County with expertise in General, Regional, Rural Planning and Environmental Planning including air quality chemistry, water quality chemistry, map making, data generation design of its use for studies. She worked primarily at the Civic Center Complex in the east wing of 70 West Hedding.

She never saw any notice posted that pesticides were being used, or had been used and claims to have no reason to believe that pesticide had ever been used in the building.

DISCUSSION

1. The Members of the Board of Supervisors are immune from liability.

Plaintiff asserts that Defendants Diane McKenna, Zoe Lofgren, Ron Gonzales, Rod Diridon and Michael Honda are members of the Santa Clara County Board of Supervisors. Comp. at 2:11-12. California Government Code Section 820.9 provides that members of the Board of Supervisors . . . are not vicariously liable for injuries caused by the act or omission of the public entity or advisory body." Plaintiff has not alleged any intentional wrongdoing that might defeat this immunity. Plaintiff has only alleged vicarious liability of these defendants because they were members of the Board of Supervisors. It was the County, not the actual Board, according to the complaint, that contracted with the pest control entities.

Accordingly, Diane McKenna, Zoe Lofgren, Ron Gonzales, Rod Diridon and Michael Honda, are DISMISSED with prejudice from this action.

2. Santa Clara County Employees are immune form liability.

Plaintiff's complaint alleges that Defendants Sally Reid, Paul Sager, Peter Claus, George Tokushige, Doward Washington, Leode Franklin, Greg Wasenhove and Imelda Elonzo are all public employees of the County of Santa Clara. Compl. at 2:19-3:23. She also alleges that each of these public employees inflicted injury upon her as a result of the employee's decision-making and/or oversight authority. Each of these employees is immune from personal liability under Section 820.2 and must be dismissed.

Accordingly, Sally Reid, Paul Sagers, Peter Claus, George Tokushige, Doward Washington, Leode Franklin, Greg Wasenhove and Imelda Elonzo are DISMISSED with prejudice from this action.

AS TO DEFENDANTS COUNTY OF SANTA CLARA AND BOARD OF SUPERVISORS

3. The Worker's Compensation Act preempts Plaintiff's First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Sixteen, Seventeenth, Eighteenth, Twenty-first and Twenty-second claims.

Sixteen of Plaintiff's twenty-two claims are preempted by California's Worker's Compensation Act, Labor Code Sections 3200-6240. These claims all are allegations of personal injury allegedly incurred in the course and cope of employment. Liability for work-related injuries under the Act is "in lieu of any other liability whatsoever to any person," except for a few narrow exceptions that, do not apply to this case. Labor Code § 3600 (a); Bell v. Macy's California, 212 Cal App. 3d 1442, 1448 (1989).

Plaintiff's complaint concede on its face that she "is and at all times herein stated [was] a Santa Clara County Employee from May 1977 injured by the illegal application and exposure to pesticides. . . . " Compl. at 2:2-4. She further states that she "was exposed to restricted materials, toxic pesticides, applied by the county and its agents during working her [sic] hours, 9:00am to 6:00pm, during night and week end meetings, and while working overtime in service to the county at her workplace. . . . These exposures have now disabled plaintiff." Compl. at 15:5-8, 12. Plaintiff's complaint is a binding admission that her purported injuries allegedly arose out of and in the course of her employment. See Smith v. Walter E. Heller & Co., 82 Cal.App. 3d 259, 269 (1978) (allegation of a pleading is conclusive judicial admission).

In her eighteenth and twenty-first claims, Plaintiff tries to invoke the fraudulent concealment exception to exclusivity set forth in Labor Code Section 3602(b)(2). According to Santiago v. Firestone Tire & Rubber Co., 224 Cal.App. 3d 1318, 1334 (1990), Plaintiff must show that the County had actual knowledge of her injuries; constructive or imputed knowledge is insufficient. Risk of disease or injury is also insufficient. McDonald v. Superior Court, 180 Cal. App. 3d 297, 303 (1986). Plaintiff has failed to allege any facts that Defendants were aware the injuries existed (not its alleged cause) and fraudulently concealed this from her.

Plaintiff also tries to involve Labor Code Section 3706 which provides "if any employer fails to secure the payment of compensation, any injured employee or his dependents may bring an action at law against such employer for damages, as if this division did not apply." In the complaint itself Plaintiff states that Defendant did in fact secure the payment of compensation because the county is self-insured for worker's compensation purposes.

Even though Plaintiff has alleged other statutory violations, the workers compensation statute overrides those claims See Potter v. Arizona Coach Lines, Inc. 202 Cal. App. 3d 126, 134 (1988) ("Conduct which may appear to violate provisions of different statutes still may fall within the provisions of the Worker's Compensation Act."); see also Nation v. Certained Cor., 84 Cal. App. 3d 813, 817 (1978) ("aggravation of the original industrial injury by medical treatment has been held to be a foreseeable consequence of the original compensable injury, compensable within the workers' compensation proceeding and not the proper subject of an independent common law damage proceeding against the employer.")

The sixteen claims which are preempted by the Workers' Compensation Act are also subject to dismissal under Federal Rule of Civil Procedure 12(b) (1) for lack of subject matter jurisdiction since Plaintiff has failed to state facts negating the exclusivity of her workers' compensation remedy for her work-related injuries.

Plaintiff also includes a Civil Rights claim in her tenth claim. However, it must be pled more specifically because the allegations are so vague and ambiguous the defendant's cannot respond.

In order to state a claim under Section 1983 for a violation of civil rights, Plaintiff must allege two essential elements: (1) a violation of a right secured by the Constitution or laws of the United States, and (2) that the alleged deprivation was committed by a

person acting under the color of state law. West v. Atkin, 487 U.S. 42, 48 (1988).

The Supreme Court has directed trial courts to liberally construe pro se papers, Hughes v. Rowe, 449 U. S. 5, 9 (1980), especially where civil rights claims are alleged. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1988).

Federal Rule of Civil Procedure 12 (e) allows a party to move for a more definitive statement "[i]f a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading. . . ." As discussed, above, Plaintiff alleges violations of federal rights but fails to identify which purported rights were violated or how or when they were violated. Without this information, Defendants cannot possibly respond to the charge that they have deprived Plaintiff of these rights. Furthermore, these claims are excludable under worker's compensation if they turn out to be mere repetitions of Plaintiff's personal injury claims.

Accordingly, Plaintiff's First, Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Eleventh, Twelfth, Sixteenth, Seventeenth, Eighteenth, Twenty-first and Twenty-second claims are DISMISSED against Defendants County of Santa Clara and the Santa Clara County Board of Supervisors. However, with respect to the tenth claim, Plaintiff has twenty (20)days from the date of this order to amend the complaint to state a Civil Rights claim.

4. Fifteenth and nineteenth claims are vague and ambiguous.

These two claims do not specify any factual sources of liability -- statutory, constitutional, common-law or other -- attaching to such alleged behavior by Defendants. Furthermore, Plaintiff makes no allegation of any resulting injury to persons and fails to cite a specific code section in the claim that Defendants maintained a contract to apply pesticides without demonstrated need or the existence of pests. No law is cited allowing Plaintiff to maintain such a claim.

Accordingly, the fifteenth and nineteenth claims are DISMISSED. Plaintiff has twenty (20) days from the date of this order to amend the complaint to specifically indicate the sources of liability and any resulting injury to persons stemming from the alleged acts.

5. Plaintiff's thirteenth and fourteenth claims under the Americans with Disabilities Act must be dismissed because Plaintiff has not pled the requisite facts with adequate specificity.

It is unclear if Plaintiff's claims are covered by the Americans with Disabilities Act ("ADA") because of ambiguity in the dates contained in the complaint.

The ADA became effective on July 26, 1992, and does not apply retroactively. Pub. L. No., 101-336, §108; Binder v. Emerson Elec. Co., 1992 WL 442111 (E.D. Mo.). Plaintiff argues that her claim matured when she was unable to be accommodated by the County after they caused her medical condition. No specific date was provided in the complaint for this date of non-accommodation. According to 42 USC § 2000(e)(5)(1) Plaintiff must have filed her claim within 300 days of its maturing.

Furthermore, Plaintiff has failed to allege that she received any "right-to-sue" letter as required under 42 USC § 12117; Kent v. Director, mo. Dept. of Elem. & Sec., Educ., 792 F.Supp. 59, 62 (E.D. Mo. 1992).

Accordingly, the thirteenth and fourteenth claims against the County and the Board of Supervisors are DISMISSED with twenty (20) days from the date of this order to amend the complaint to specify the required deadlines were met.

6. Plaintiff's sixth claim, based on Proposition 65 must be dismissed because the statute does not apply to governmental entities.

Plaintiff alleges that Defendants have violated Proposition 65, also known as the Safe Drinking Water and Toxic Enforcement Act of 1986, Health and Safety Code Sections 25249.5-25249.13. This claim must be dismissed because Proposition 65 does not apply to government entities. The statute explicitly excludes "any city, county, or district or any department or agency thereof. . . ." Health and Safety Code § 25249.11(b).

Accordingly, the sixth claim is DISMISSED with prejudice.

7. Plaintiff may not bring a claim for punitive damages against the County.

In her prayer for relief, Plaintiff seeks punitive damages of an unspecified amount against unidentified defendants. Complaint at

28:21-25. Under Section 818 of the Government Code, the County cannot be liable for punitive damages. Section 818 provides: "Notwithstanding any other provisions of law, a public entity is not liable for damages awarded under Section 3294 of the Civil Code or any other damages imposed primarily for the sake of example and by way of punishing defendant."

Accordingly, Plaintiff's prayer for punitive damages is hereby stricken.

8. Sixteenth Claim.

It merely appears that this claim is a restatement of earlir allegations. No new claim is described. Accordingly, this clim is DISMISSED pursuant to Federal Rule of Civil Procedure 12 (). Plaintiff has twenty (20) days from the date of this order to mend the complaint.

9. Eighteenth Claim

The Court dismisses this claim pursuant to Rule 12(f), and 12(b)(6) but will allow Plaintiff twenty days from the date of this order to amend the complaint.

10. Nineteenth Claim

As no causation, code section or damages are alleged Plaintiff fails to state a claim. Accordingly, this claim is DISMISSED. Plaintiff has twenty (20) days from the date of this order to amend the complaint.

11. Twentieth and Twenty-second Claims:

The Defendants APM/CLARK are not Plaintiff's employer and thus these claims can not apply to them. Accordingly, these claims are DISMISSED with prejudice against Defendants APM/CLARK.

IT IS SO ORDERED.
[*signed*] DATED: January 14, 1994

James Ware
Honorable James Ware
United States District Judge

Appendix 5

[*stamped*] **FILED JUNE 27, 1994**

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT

CHERIEL JENSEN, Plaintiff	)	No. CV-93-20617-JW
v.	)	ORDER GRANTING IN
	)	PART AND DENYING
COUNTY OF SANTA CLARA, et al.,	)	IN PART DEFENDANTS'
	)	MOTIONS TO DISMISS
Defendants	)	AND DENYING MOTION
	)	FOR RECONSIDERATION

Defendants Applied Pest Management ("APM"), Gregory Clark ("Clark"), County of Santa Clara ("County"), the Santa Clara Board of Supervisors ("Board") and Thomas Finn ("Finn") motions to dismiss Plaintiff's First Amended Complaint was submitted on the papers. Plaintiff's Motion for reconsideration of the court's order striking her second amended complaint was also submitted on the papers. Having reviewed all pleadings filed to date, and good cause appearing therefor, the Court GRANTS in part and DENIES in part Defendant's motion to dismiss, as discussed below. The Court also DENIES Plaintiff's motion for reconsideration.

I. BACKGROUND

The factual and procedural background have been discussed in the Court's previous orders granting Defendants' motions to dismiss, as well as the Court's order granting summary judgment in favor of Instar Pest Consultants. Therefore, it will not be reiterated herein.

II. LEGAL STANDARDS

In ruling on a motion to dismiss, the court must accept as true all allegations of material fact and must construe said allegations in the light most favorable to the non-moving party. Western Reserve Oil & Gas Co. v. New, 765 F.2d 1428, 1430 (9th Cir. 1985). Any existing ambiguities must be resolved in favor of the pleading. Walling v. Beverly Enterprises, 476 F.2d 393, 396 (9th Cir. 1973). Fraud claims must be plead with particularity. Romani v. Shearson Lehman Hutton, 929 F.2d 875, 878 (1st Cir. 1991).

III. DISCUSSION

A. APM/Clark's Motion to Dismiss

Defendants APM and Clark move to dismiss the first, second, third, sixth, fourteenth, sixteenth, and eighteenth claims from Plaintiff's First Amended Complaint.[1] Each of these claims is addressed separately below.

1. First Claim

With respect to Plaintiff's first claim for relief, based upon "Intentional Sweeping Violation of Statutes", Plaintiff contends that Defendants APM and Clark violated certain provisions of the Labor Code, the California Business and Professions Code, the Food and Agriculture Code, the California Code of Regulations, the Health and Safety Code and Title 7 U.S.C. Sections 136i1(a) and (c), 136j(a)2(b)(i)(ii)(iii) and 136j(a)(2)G. However, Plaintiff's complaint once again fails to state a claim for relief against Defendants under any of these provision.

Defendant's are not Plaintiff's employer and cannot, therefore, be held liable to her under the Labor Code provisions. The Business and Professions Code, the Food and Agriculture Code, nor the Health and Safety Code provide for private civil actions such as Plaintiff's to be brought against Defendants. Plaintiff has failed to show that she has exhausted all required administrative remedies pursuant to the California Code of Regulations and cannot, therefore, maintain a claim under such Regulations. Finally, Plaintiff has failed to plead sufficient facts to show that Defendant's failure to comply with certain provisions of Title 7 caused her injury. Therefore, the Court hereby GRANTS Defendants' APM and Clark's motion to dismiss Plaintiff's first claim.

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[1] Defendants APM and Clark also move for a more definite statement as to Plaintiff's third, fourteenth and eighteenth claims and move to strike Plaintiff's first, third, sixteenth and eighteenth claims. However, since the Court grants Defendants' motion to dismiss all claims except the third, these alternative motions are moot. With respect to Plaintiff's third claim, the Court finds that such claim adequately states a claim for failure to warn and is not redundant. Therefore, Defendants' motions for a more definite statement or to strike are denied

2. Second Claim

Defendants also move to dismiss Plaintiff's second claim, that the application of pesticides constitutes an ultra-hazardous activity, on the basis that such activity is not ultra-hazardous as a matter of law. Though Defendant's are correct in stating that the issue of whether an activity is ultra hazardous or abnormally dangerous presents a question of law for the court, Ahrens v. Superior Court, 197 Cal.App.3d 1134 (1988), the factors which the Court must consider to determine such questions involve factual issues which are not properly resolvable on a motion to dismiss.

As stated above, in evaluating Defendants' motion to dismiss, the Court must accept all allegations contained in the complaint as true, and must construe any ambiguities existing in those allegations in favor of the Plaintiff. Plaintiff's second claim for relief, on its face, states a valid cause of action for engaging in an ultrahazardous or abnormally dangerous activity. In reviewing the factors set forth in the Restatement of Torts 2d, Section 520, the Court cannot conclude that Plaintiff's pleading is inadequate and fails to state a claim for relief. In evaluating all the factors taken together, as the Court must, it is not apparent from the face of the complaint that the application of the pesticide did not, in fact, constitute an ultra-hazardous or abnormally dangerous activity. Therefore, Defendants' motion to dismiss Plaintiff's second claim is hereby DENIED.

3. Third Claim

Defendants move to dismiss Plaintiff's third claim, willful creation of a dangerous condition of property, negligence and failure to warn on the basis that such claim is "redundant". However, Defendants do not state how or why such claim is allegedly redundant and the Court does not find such claim to be redundant. Therefore, the Court DENIES Defendant's motion to dismiss Plaintiff's third claim.

4. Sixth Claim

Plaintiff's sixth claim, based upon violation of the California Health and Safety Code, must be dismissed on the basis that Plaintiff cannot maintain a private damage action under Proposition 65. Section 25249.7(d) only permits actions to be brought "in the public interest". Here, Plaintiff is clearly seeking monetary damages for her own personal injuries. Further, there is no allegation that Plaintiff complied with Proposition 65's notice requirements. Therefore, Defendants' motion to dismiss Plaintiff's sixth claim is GRANTED.

5. Fourteenth Claim

Defendants also move to dismiss Plaintiff's fourteenth claim under the American with Disabilities Act, since such Act is not retroactive and does not apply to conduct prior to July 26, 1992. Title 42 U.S.C. § 12111(5)A. Plaintiff's last day of work was July 1, 1992. Therefore, Plaintiff's fourteenth claim is DISMISSED.

6. Sixteenth Claim

Defendants move to dismiss Plaintiff's sixteenth claim for damages on the basis that, as noted above, Defendant's APM and Clark are not Plaintiff's employer, and cannot, therefore, be held liable to Plaintiff under Labor Code Section 2800. This claim is hereby DISMISSED.

7. Eighteenth Claim

Finally, Defendants move to dismiss Plaintiff's eighteenth claim which is a mishmash of several different claims. The Court finds that, even evaluating each claim separately, Plaintiff cannot state a claim for relief against these Defendants. Therefore, the Court GRANTS Defendants' motion to dismiss Plaintiff's eighteenth claim.

8. Statute of Limitations

As the Court previously determined in its order granting Instar's motion to summary judgment, Plaintiff learned that she was injured by pesticides as early as 1977. However, Plaintiff did not file her complaint until June of 1993. Therefore, applying California Civil Code Section's 340(3) time limit, Plaintiff may seek recovery for damages she sustained only for the time period from June 14, 1992 through June 14, 1993. All time prior to and following this period is barred by the one-year statute of limitations.

9. Punitive Damages

Defendants also request that Plaintiff's prayer for punitive damages be stricken against them. California Civil Code § 3294 allows for the recovery of punitive damages only where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, malice or fraud. Here there is no allegation, which has survived Defendant's motion to dismiss, that indicates that any of Defendants acts oppressively, fraudulently or with malice.

Therefore, the Court GRANTS Defendants' motion to strike Plaintiff's prayer for punitive damages.

B. County/Board/Finn's Motion to Dismiss

The County and the Board move to dismiss Plaintiff's tenth, thirteenth, fourteenth and twentieth claims. Finn moves to dismiss Plaintiff's seventeenth and twenty-first claims. All three Defendants move to strike Plaintiff's prayer for inductive relief and request Rule 11 sanctions.

1. Tenth Claim

Plaintiff's tenth claim is purportedly based upon violations of her alleged "freedoms", however, her complaint again fails to cite a federal statute or constitutional provision which protects these alleged freedoms. Accordingly, Defendants' motion to dismiss Plaintiff's tenth claim is GRANTED.

2. Thirteenth and Fourteenth Claims

Plaintiff's claims based upon alleged violations of the American's with Disabilities Act ("ADA") must be dismissed because they are based upon conduct which occurred prior to the effective date of ADA, as discussed in Section A.5., above. Accordingly, the Court GRANTS Defendants' motion to dismiss Plaintiff's thirteenth and fourteenth claims.

3. Fifteenth Claim

Plaintiff's fifteenth claim for "misuse of authority" again fails to allege any statutory, constitutional, common law or other source of liability against Defendants. Plaintiff also lacks standing to maintain an action on behalf of the neighborhood children, her grandson, three opossums and five neighborhood cats. Therefore, Plaintiff's fifteenth claim is DISMISSED.

4. Twentieth Claim

Plaintiff's twentieth claim is based upon Defendants' alleged breach of a collective bargaining agreement entered between moving Defendants and Service Employees Local 715 International Union. However, even if such allegations are true and the agreements was breached, Plaintiff may not maintain an independent action under the agreement. Plaintiff lacks standing, as an individual, to sue under the

terms of the Agreement. Rather, the Union must maintain such action. Therefor, Plaintiff's Twentieth claim is DISMISSED.

5. Fifteenth and Seventeenth Claims

Defendant Finn, council of record in Plaintiff's ongoing worker's compensation proceeding, moves to dismiss the fifteenth and seventeenth claims against him on the basis that he is immune from suit pursuant to California Civil Code Section 47(b). Section 47(b) provides that a publication is privileged in any legislative or judicial proceeding. Here Plaintiff is complaining about Defendant Finn's advice to her during her workers compensation proceeding. Pursuant to Section 47, Defendant Finn's advice to Plaintiff is privileged. Accordingly, the Court hereby GRANTS Defendant Finn's motion to dismiss Plaintiff's seventeenth and twenty-first claims.

6. Injunctive Relief

Plaintiff's prayer for inductive relief includes a demand for indictment of the Defendants and seeks relief on behalf of third parties. Both requests are improper and are hereby STRICKEN.

7. Rule 11 Sanction

Defendants' request Rule 11 sanctions "if they are forced to proceed further". However, the Court has granted their motion to dismiss in its entirety. Therefore, they are dismissed from this action and will not have to proceed further. Defendants' request for Rule 11 sanctions is DENIED.

C. Motion for Reconsideration

Plaintiff moved for reconsideration of the Court's prior order striking her Second Amended Complaint. based upon the pleadings filed to date, and good cause appearing therefore, the Court DENIES Plaintiff's motion. Plaintiff is instructed to file a Second Amended Complaint in conformity with this Order. Namely, Plaintiff's Second Amended Complaint shall set forth the allegations contained her Second and Third Claims only against Defendants Applied Pest Management, Inc. and Gregory Clark. All other claims and defendants have been dismissed, and Plaintiff's Second Amended Complaint should so indicate.

IV. CONCLUSION

Based on the foregoing, the Court hereby GRANTS Defendant's motion to dismiss as to all the claims and all Defendants, with the exception of Plaintiff's second and third claims against Defendants APM and Clark. The Court also DENIES Plaintiff's motion for reconsideration.

IT IS SO ORDERED
DATED June 27, 1994
James Ware
United States District Judge

Appendix 6

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT

CHERIEL JENSEN, Plaintiff	)	No. CV-93-20617-JW
v.	)	ORDER GRANTING DEFENDANTS'
COUNTY OF SANTA CLARA, et al., Defendants	)	MOTION TO DISMISS

Defendants Applied Pest Mangement and Gregory Clark's (collectively, "Defendants"), motion to dismiss Plaintiff's Second Amended Complaint was submitted on the papers. Good cause appearing therefor, the Court GRANTS Defendant's motion to dismiss pursuant to Federal Rules of Civil Procedure, Rule 41(b). Plaintiff has failed to comply with this Court's order, dated June 27, 1994, in which she was instructed to delete all defendants and all claims and to file an amended complaint setting forth only those allegations contained in her second and third claims of her First Amended Complaint against only these moving Defendants. In defiance of that order, Plaintiff has filed a Second Amended Complaint which contains all of her claims against all of the defendants which have been dismissed from this action. Accordingly, pursuant to Rule 41, the Court DISMISSES Plaintiff's Second Amended Complaint.

IT IS SO ORDERED.
DATED: September 16, 1994
James Ware
JAMES WARE
United States District Judge